

1. Introduction

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Article 102 of the Treaty on the Functioning of the European Union (hereinafter Art. 102 TFEU) probably represents one of the most ‘obscure’ provisions in the Treaty. Although the wording of this article has not changed in a material way since the Treaty of Rome,¹ the meanings of ‘dominance’ and ‘abuse’ have evolved during the past decades via the case law of the Court of Justice of the EU (CJEU) as well as the Decisions and soft law adopted by the EU Commission.

The concept of ‘dominance’ has not changed since the Court codified a definition in *Hofmann La Roche*.² On the other hand, the EU Commission has recognized that some of its early decisions probably led to market definitions that were too narrow and poorly reasoned, so that in 1997 it issued a Notice on market definition to correct some of these errors.³ For instance, it is unlikely that the Commission would again define a market for bananas based on the evidence presented in *United Brands*.⁴ Instead, the Commission is more likely to use better empirical data to determine what products

¹ The Treaty on the Functioning of the European Union finally changed ‘common market’ into ‘internal market’ in all the articles in Title VII.

² ‘Dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.’ See Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECLI:EU:C:1979:36, para. 38.

³ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5.

⁴ Case C-27/76, *United Brands Company and United Brands Continental BV v Commission* [1978] ECLI:EU:C:1978:22.

are substitutes. Its case law on mergers shows how much more robust the process of market definition has become.⁵

The concept of ‘abuse’ instead has been more controversial at the origin and subject to constant evolution. By analysing the *travaux préparatoires* of the Rome Treaty, some authors have concluded that the EC founding fathers drafted Art. 102 primarily to sanction ‘exploitative’ abuses (for example, excessive pricing and unfair contractual conditions) imposed by large (i.e. dominant) corporations on final consumers.⁶ The emphasis on exploitative abuses could be explained by the fact that in the 1950s most of the prices for basic commodities in Western Europe were still regulated by the State.⁷ Secondly, the wording of Art. 102 was also influenced by the system of price controls introduced in the European Coal and Steel Community (ECSC) Treaty, which granted the ECSC Commission the power to directly regulate prices in the coal and steel markets when they were considered to be ‘excessive’.⁸

Since the EU Commission did not adopt any Decision under Art. 102 during the immediate years following the entry into force of the Rome Treaty, the meaning of the provision remained ‘obscure’ and initially led some authors to argue that Art. 102 was aimed at sanctioning exploitative conducts which could harm final

⁵ See, generally, Simon Bishop and Mike Walker (2002), *The Economics of EC Competition Law*, 2nd edn, London: Sweet and Maxwell, ch. 4.

⁶ See, in particular: Pinar Akman (2012), *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, Oxford: Hart Publishing; Pinar Akman (2009), ‘Searching for the long-lost soul of Article 82 EC’, *Oxford Journal of Legal Studies*, **29**, 267; Kiran Klaus Patel and Heike Schweitzer (2013), *The Historical Foundations of EU Competition Law*, Oxford: Oxford University Press.

⁷ Heike Schweitzer (2007), ‘Parallels and differences in the attitudes towards single-firm conduct: what are the reasons? The history, interpretation and underlying principles of Sec 2 Sherman Act and Art 82 EC’, EUI Law Working Paper No. 2007/32, p. 16, accessed 22 June 2016 at <http://cadmus.eui.eu/handle/1814/7626>.

⁸ Jörg Philipp Terhechte (2012), ‘Excessive pricing and the goals of competition policy – an enforcement perspective’, in Daniel Zimmer (ed.), *The Goals of Competition Law*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, ch. 19.

consumers.⁹ The turning point in the interpretation of the objectives of Art. 102 took place when the CJEU recognized in *Continental Can* that this provision could also sanction exclusionary abuses.¹⁰ In particular, in *Continental Can* the CJEU clarified that Art. 102 TFEU had to be interpreted with a view of the overriding purpose of safeguarding a system of ‘undistorted competition’ within the common market.¹¹ Exclusionary practices thus fell within the scope of the application of Art. 102 TFEU: by excluding its competitors, the dominant firm damaged the development of the common market.¹² Today, exclusionary conduct by far dominates the enforcement of this provision by the Commission and many National Competition Authorities (NCAs).

The CJEU case law and EU Commission Decisions have progressively broadened the concept of ‘abuse’ by including different kinds of business conduct. For instance, until a few years ago it was unknown that a holder of intellectual property rights could be held liable under Art. 102 for refusing to license its rights to a

⁹ René Joliet (1970), *Monopolization and Abuse of Dominant Position. A Comparative Study of the American and European Approaches to the Control of Economic Power*, Brussels: La Haye, p. 131.

¹⁰ ‘Article 86 (now Article 102 TFEU) ... is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such is mentioned in Article 3(f) of the Treaty’: Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECLI:EU:C:1973:22, para. 26.

¹¹ Schweitzer (n. 7), pp. 19–20.

¹² Examples of exclusionary conduct sanctioned under Art. 102 TFEU are:

- the dominant firm refuses to continue dealing with a competitor which was previously a customer;
- refusal for access to an essential facility: the dominant firm refuses to grant access to its own essential facility to a competitor (for example, infrastructure, IP);
- predatory pricing: the dominant company sells its goods below costs to force competitors out of the market;
- margin squeeze: the dominant firm charges the competitor a higher access price to its infrastructure in comparison to another competitor, thus squeezing the profit margin of the competitor;
- bundling and tying: the dominant firm sells its goods tied/bundled together, in order to increase the loyalty of its customers;
- fidelity rebates: the dominant firm provides rebates to customers who stop being supplied by competitors.

competitor,¹³ or that a patent holder would abuse a dominant position when providing misleading information to the patent office concerning the nature of its rights,¹⁴ or if it asked for an injunction against a potential licensee which breached its patent rights.¹⁵ The broad interpretation of the concept of abuse under Art. 102 has generated a lively debate in the literature: on the one hand, some authors have recognized that the extension of the list of abuses is needed, in order to keep up the enforcement of this provision with technological innovation and new types of business activity. On the other hand, other authors have criticized the formalistic approach followed by the EU courts, which have included new business conducts in the ‘abuse box’ without carrying out an economics analysis of the effects of the alleged abusive conduct on the competition in the market.¹⁶

¹³ In *Macgill*, the CJEU ruled that the refusal by the dominant company to license copyright information to competitors could breach Art. 102 TFEU when it prevented the development of a new product in the market: Case C-241/91, *Radio Telefís Éireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECLI:EU:C:1995:98. This case law was later applied by the General Court (GC) in *Microsoft* in relation to patents: Case T-201/04, *Microsoft Corp. v Commission* [2007] ECLI:EU:T:2007:289.

¹⁴ In *Astra Zeneca* the CJEU held that the pharmaceutical company had breached Art. 102 for having provided misleading information to the national patent offices, in order to extend the duration of its patents and prevent competitors from selling generic drugs relying on the same chemical principle subject to the patent: Case C-457/10, *Astra Zeneca v Commission* [2012] ECLI:EU:C:2012:770.

¹⁵ In *Huawei* the CJEU ruled that the standard-essential patent (SEP) owner could breach Art. 102 TFEU when it asked for a court injunction against a potential licensee (see Chapter 5 by Schweitzer in this volume): Case C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* [2015] ECLI:EU:C:2015:477.

¹⁶ These two views are visible, for instance, in the comments that followed the GC ruling in *Intel* in 2014. See: Wouter Wils (2014), ‘The judgment of the EU General Court in *Intel* and the so-called more economic approach to abuse of dominance’, *World Competition*, 37(4), 405–34; James Venit (2014), ‘Case T-286/09 *Intel v. Commission* – the judgment of the General Court: all steps backward and no step forward’, *European Competition Journal*, 10(2), 203–230; Pablo Ibáñez Colomo, ‘*Intel* and Article 102 TFEU case law: making sense of a perpetual controversy’, LSE Legal Studies Working Paper No. 29/2014, accessed 23 June 2016 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530878.

The present volume aims at contributing to the existing debate on Art. 102 by extending the scope of discussion. In particular, the majority of publications have discussed the goals of Art. 102 TFEU,¹⁷ the standards of assessment followed by the EU institutions,¹⁸ as well as the role of economics and efficiency considerations in cases of abuse of dominance.¹⁹ Furthermore, most of the attention has been devoted to the practice of the Commission and the CJEU. The eight contributions included in this volume follow a comparative approach. As a result of the decentralization of EU competition law enforcement, a growing number of decisions sanctioning abuses of dominance are nowadays adopted by the NCAs of the EU Member States.²⁰ Similarly, national administrative courts are increasingly involved in the review of the NCAs' decisions, while a growing number of damage compensation claims are brought to national civil courts. The book thus aims at analysing emerging trends in the enforcement and interpretation of Art. 102, either in individual countries or following a cross-country comparative perspective. In particular, a number of chapters analyse recent enforcement trends of Art. 102 in the UK, Germany and Italy. These three jurisdictions stand out as having important features of wider significance: generally speaking, the British courts deploy case management techniques that allow them to go to the heart of the substantive issue more effectively than other systems, the German legal system struggles to align national and European legal

¹⁷ See, for instance: Patel and Schweitzer (n. 6); Akman (2012) (n. 6); Daniel Zimmer (ed.) (2012), *The Goals of Competition Law*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing.

¹⁸ See, for instance: Luca Rubini (ed.) (2010), *Microsoft on Trial*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing; Liza Lovdahl Gormsen (2010), *A Principled Approach to Abuse of Dominance in European Competition Law*, Cambridge: Cambridge University Press.

¹⁹ See, for instance: Hedvig Schmidt (2015), *Market Power in Competition Law: Investigating the Concept of Dominance*, Oxford: Hart Publishing; Ariel Ezrachi (ed.) (2009), *Article 82 EC: Reflections on its Recent Evolution*, Oxford: Hart Publishing; Marc Oliver Mackenrodt et al. (eds) (2008), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, New York: Springer.

²⁰ Statistics on the number of Art. 102 investigations carried out by the EU Commission and NCAs are periodically elaborated by the European Competition Network (ECN). The statistics are available at <http://ec.europa.eu/competition/ecn/statistics.html> (accessed 23 June 2016).

standards, while the Italian system is an active contributor to novel approaches to abuse of dominance elaborated by the CJEU and the EU Commission.

Three emerging trends can be identified throughout the chapters:

1. The role of ‘intent’ in Art. 102 TFEU: since its early case law, the CJEU has stated that abuse is an ‘objective’ concept – i.e. a conduct breaches Art. 102 TFEU whenever it falls in the ‘abuse box’, independently of the willingness of the dominant firm to harm competition.²¹ The latter represents one of the major differences between Art. 102 TFEU and Section 2 Sherman Act,²² which on the contrary takes into consideration the intention of the firm to monopolize the market. In spite of the objective nature of abuse, EU and national courts have increasingly taken into consideration in their rulings the intention of the dominant firm to harm competition. In particular, intent is often used to determine the amount of the fine to be imposed. In addition, when sanctioning ‘new’ types of abuses, courts often take into consideration whether the dominant company was aware that its practice could harm competitors. As noted by Parcu/Stasi and Siragusa in this volume, the intent of the dominant firm is increasingly taken into consideration both by the CJEU as well as by national

²¹ ‘The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’: Case 85/76 (n. 2), para. 91.

²² Section 2 Sherman Act is considered the equivalent provision of Art. 102 TFEU under US antitrust law. Section 2 sanctions ‘every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among several States ...’. In *Spectrum Sport*, the US Supreme Court ruled that an ‘attempt to monopolize’ takes place when: the firm carries out an exclusionary conduct; the firm has the intention to monopolize; there is a dangerous probability that the firm will monopolize the market: *Spectrum Sports, Inc. v McQuillan*, 506 U.S. 447 (1993).

courts – for example, Italian courts in assessing ‘new’ forms of abuse of dominance sanctioned for the first time at the national level. Therefore, although the CJEU repeats on all occasions the ‘mantra’ of the objective nature of the concept of abuse, intent is increasingly playing a role in the court’s interpretation of the notion of abuse of dominance.

2. New types of abuse: in line with the broad interpretation of the concept of abuse mentioned above, some contributions to this volume discuss new forms of abuse recognized both by EU and national courts. For instance, in her chapter Schweitzer analyses the refusal to license a standard-essential patent (SEP) by a patent holder. In particular, the chapter compares the EU Commission Decisions (*Motorola*²³ and *Samsung*²⁴), CJEU case law (*Huawei*²⁵) and the German case law (*Orange Book Standard*²⁶) on this issue. Similarly, in his chapter, Siragusa analyses Italian case law in relation to other new types of abuse of dominance, such as vexatious litigation and abuse of regulatory process. The chapters included in this volume show that in developing new types of abuse, EU and national courts engage in an active dialogue. In particular, two dynamics can be identified: while in the case of SEP, German case law pre-dated EU case law on this issue, in the case of the new forms of abuse analysed by Siragusa the rulings of the Italian courts/decisions of the Italian NCA followed developments at the EU level. However, in both cases national courts and NCAs have provided an active contribution to the interpretation of Art. 102. In particular, Siragusa notes in his chapter that in contrast with the objective nature of the

²³ Commission Decision of 29 April 2014 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement. Case AT.39985 – *Motorola – Enforcement of GPRS standard essential patents* [2014] OJ C344/6.

²⁴ Commission Decision of 29 April 2014 relating to a proceeding under Article 102 of the Treaty on the functioning of the European Union and Article 54 of the EEA Agreement. Case AT.39939 – *Samsung – Enforcement of UMTS standard essential patents* [2014] OJ C350/8.

²⁵ Case C-170/13 (n. 15).

²⁶ Bundesgerichtshof (BGH), 6 May 2009, KZR 39/06, GRUR 2009, 694 *Orange Book Standard*.

concept of abuse, Italian courts have introduced an intent-based test to assess new forms of abuse of dominance and they have taken into consideration in their analysis the general concept of ‘abuse of law’ too. On the other hand, Schweitzer notices that *Huawei* has not overruled the divergent *Orange Book Standard* case law. In fact, while *Huawei* dealt with SEP developed by a standard-setting organization (SSO), *Orange Book Standard* dealt with a *de facto* standard spontaneously developed by the market; the German and EU case law, therefore, continue to co-exist.

In conclusion, as recognized by Monti in his contribution, far from being passive receptors of the case law developed in Luxembourg and Brussels, national courts and NCAs seem to play an active role in shaping new types of abuse sanctioned under Art. 102.

3. Decentralization of Art. 102 enforcement: as mentioned above, one decade after the decentralization of EU competition law brought by Regulation 1/2003,²⁷ NCAs and national courts are active enforcers of Art. 102 TFEU. The third emerging trend identified in this volume concerns the increasing inconsistency between the enforcement of Art. 102 TFEU at the national and EU level. As noticed by Monti in this volume, besides the CJEU case law and EU Commission infringement Decisions, other sources of law elaborated at the EU level (for example, EU Commission commitment decisions and guidelines²⁸) influence the enforcement of Art. 102 TFEU by national authorities. Most of the contributions to the volume, however, point out that national courts and NCAs tend to interpret and enforce Art. 102 TFEU in a manner subtly ‘divergent’ in comparison to the trends defined in Brussels and Luxembourg. Besides the different interpretation

²⁷ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/25.

²⁸ See, in particular, the EU Commission Guidance paper on Art. 102: Communication from the Commission, ‘Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ [2009] OJ C45/7.

on the ‘new’ types of abuse mentioned above, this trend is visible in relation to other issues as well:

- (a) Private enforcement of Art. 102 TFEU: in the past few years, the EU Commission has stimulated private enforcement of EU competition rules, in particular follow-on damage actions in cartel cases.²⁹ Nevertheless, in his chapter Whish points out that in the UK most of the cases of private enforcement of Art. 102 TFEU have developed as stand-alone, rather than follow-on claims. Contrary to the expectations of the EU Commission, plaintiffs have directly started damages proceedings in UK courts, rather than submitting a complaint to the NCA and awaiting the results of the investigations before starting a follow-on action. Whish explains the development of stand-alone actions in the UK as a result of the limited public enforcement of Art. 102 TFEU. Since the limits in public enforcement characterize most of the NCAs of the EU Member States,³⁰ it is possible to speculate that this trend might characterize other EU Member States besides the UK.
- (b) Presumption of dominance: in his chapter, Schuhmacher analyses the presumptions of dominant position

²⁹ In particular, the Damages Directive includes a number of provisions aimed at stimulating follow-on actions in cartel cases. For instance, rules on disclosure of evidence held by the NCA (Art. 6), binding effect of the NCA decision on damages proceedings (Art. 9), joint and several liability of cartelists (Art. 11), standing of indirect purchasers (Art. 14). See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

³⁰ For instance, in the Staff Working Paper published in 2014 marking the ten years entry into force of Regulation 1/2003, the EU Commission stressed that the degree of enforcement of Arts 101–102 TFEU varies among the NCAs of the EU Member States. The diverging enforcement degree is due to the different human resources of NCAs, different institutional design and enforcement powers. See European Commission Staff Working Paper, ‘Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues’. SWD (2014) 231/2, 9.7.2014, accessed 23 June 2016 at <http://ec.europa.eu/competition/antitrust/legislation/regulations.html>.

- included in German and Austrian competition law; rebuttable presumptions based on the market share of the dominant firm. The author notices that the market share indicated in the German and Austrian national legislation is substantially lower in comparison to the market share thresholds identified by CJEU case law to identify dominance,³¹ thus *de facto* creating a dual set of rules which affects the legal certainty for private firms.
- (c) Enforcement of Art. 102 TFEU in regulated industries: the chapters by Actis Perinetto/Marquis and Karova/Botta stress the divergent manner whereby NCAs and national courts have enforced Art. 102 TFEU in regulated industries (for example, telecoms and energy) in comparison to the EU Commission and EU courts. According to Actis Perinetto/Marquis, while the EU Commission has tried to preserve a complementarity between *ex-ante* regulation and *ex-post* competition law enforcement, the Italian NCA has privileged the second tool, disregarding previous decisions adopted by the sector regulator. Similarly, Karova/Botta notice that while the EU Commission has mostly sanctioned exclusionary conduct in the energy sector, a number of NCAs have focused their enforcement priorities in relation to exploitative conduct in the energy sector (for example, withdrawal of capacity, unfair contract clauses). Secondly, while the EU Commission has mostly negotiated commitments with the firms subject to investigations, the NCAs have preferred to impose fines to sanction the dominant energy operators.

One could argue that divergences in the enforcement of Art. 102 TFEU at the national and EU level are justified under Art. 3(2)

³¹ In particular, while in *AKZO* the CJEU identified dominance when a firm had at least 40% market share, the Austrian competition law includes a rebuttable presumption of dominance for the firms which own 30% market shares: Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 59 et seq.

Regulation 1/2003.³² In addition, the differences mentioned above concern both divergent ‘interpretation/application’ of the same substantive rules (for example, new forms of abuse, presumption of dominance), as well as divergent ‘enforcement’ approaches (for example, private enforcement; enforcement of Art. 102 TFEU in regulated industries). While the divergent interpretation might effectively cause legal uncertainty for private firms, different enforcement approaches are part of the discretion enjoyed by NCAs and national courts in enforcing EU competition rules. We do not enter at this point into the debate on whether and to what extent a degree of divergence in the enforcement of EU competition rules should be welcome;³³ we just note that most of the chapters included in this volume observe a divergent interpretation and enforcement of Art. 102 TFEU at the national and EU level – a relevant development ten years after the adoption of Regulation 1/2003.

As recognized by Siragusa in this volume, Art. 102 is an ‘open ended provision’; its ‘obscure’ language has generated and will continue to generate a lively debate in the literature. Far from being exhaustive, the present volume focuses on the emerging trends in the enforcement and interpretation of Art. 102 at the EU and national level; trends which will continue to unfold in the coming years.

³² ‘Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’: Art. 3(2) Regulation 1/2003 (n. 27).

³³ While some authors have suggested that a certain degree of diversity among NCAs and national courts in the enforcement of Arts 101–102 TFEU should be welcome, in order to stimulate new enforcement trends and innovative solutions, other authors have criticized such development, arguing that it decreases the degree of consistency of EU competition law throughout the Union. Examples of these two opposite views are visible in: Marco Botta, Alexandr Svetlicinii and Maciej Bernatt (2015), ‘The assessment of the effect on trade by the National Competition Authorities of the new Member States: another legal partition of the internal market?’, *Common Market Law Review*, 52(5), 1247–1276; Chris Townley (2014), ‘Co-ordinated diversity: revolutionary suggestions for EU competition law (and for EU law too)’, *Yearbook of European Law*, 33, 194–244.